

Chandler & James Corporation
d/b/a Tailgators

RR49-00528

District 6

373 South Illinois Street
Indianapolis, Indiana 46225

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

BACKGROUND OF THE CASE

The Permittee, Chandler & James Corporation, d/b/a Tailgators, 373 South Illinois Street, Indianapolis, Indiana 46225 (Permittee) is the holder of a type 210, Alcohol and Tobacco Commission (ATC) permit, permit #RR49-00528. The Permittee filed its 2001 renewal on July 18, 2002 and that renewal was assigned to the Marion County Local Board (LB) for hearing. The LB heard the renewal request on October 21, 2002, and on that same day, voted 4 – 0 to deny the renewal. The ATC adopted the recommendation of the LB on November 4, 2002, and denied the renewal.

The Permittee filed a timely notice of appeal and the matter was assigned to ATC Hearing Judge, Mark C. Webb. The HJ assigned the matter for hearing on April 28, 2003, and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement.¹ The Permittee was represented by F. Robert Lively. There were no remonstrators.² The HJ now submits his Proposed Findings of Fact and Conclusions of Law to the ATC for consideration.

II.

EVIDENCE AT THE LB HEARING³

A. WITNESSES

The following witnesses testified before the LB:

¹ Permittee has operated in the interim on several 90 day extensions pursuant to IC 7.1-3-1-3.1, issued on July 18, 2002, October 29, 2002, January 30, 2003, April 30, 2003 and July 31, 2003.

² Indianapolis Police Department Sgt. Michael Elder testified at the LB hearing at the request of the LB. This HJ had the opportunity to review the Channel 16 community television tape of the hearing, and after assessing Sgt. Elder's testimony and demeanor, determines that Sgt. Elder testified only at the request of the LB and not as an active remonstrator. Moreover, he expressed no opinion as to whether the permit in this matter should be renewed. Sgt. Elder did not appear at the appeal hearing before the ATC.

³ Permittee was ordered to appear before the LB because of a violation citation received on November 30, 2001, arising out of a lingerie show held at the permit premises. This violation was dismissed by the ATC because the underlying criminal charge against the model was dismissed by the Marion County Prosecutor's Office. Permittee had received a similar citation on August 24, 2001, upon which it had paid a fine of \$500. Permittee then appeared before the LB on November 19, 2001 and received a one-year renewal.

1. Michael Elder, Sergeant, Indianapolis Police Department. Sgt. Elder testified that on the afternoon of November 30, 2001, he entered the permit premises to investigate a lingerie show. During the show, two of the three models exposed their genital area to him while conducting the show or accepting money.⁴ Elder testified that the girls approached his table and that he did not undertake any additional steps to induce them to commit an offense.
2. Emmett D. White. White is the owner of the permit premises. He testified that he was present during the lingerie show of November 30, 2001, but did not see the complained-of conduct. He has owned the permit premises for approximately 4 years and is aware that the lingerie shows have been taking place there for approximately the last 6 years. According to White, his only prior difficulty with the lingerie shows was the August 24, 2001 violation. White did not agree with the November 30, 2001 violation and felt that IPD created it. At the LB hearing, White admitted he was still having lingerie shows. Although he stopped them shortly after the second violation, he resumed them about a month later because he couldn't compete with the fast food restaurants and needed something to draw patrons into the establishment. However, about a month prior to the LB hearing, due to lack of attendance, he scaled them back only to evenings following Indianapolis Colts home games.

B. EXHIBITS

No exhibits were introduced at the LB hearing on this renewal.⁵

EVIDENCE BEFORE THE ATC

A. WITNESSES

The following witnesses testified in favor of the permittee before the ATC:

1. Emmett D. White. White testified that Tailgators is a family-owned business and is his family's sole means of support. He believed he was complying with the laws regarding bar ownership and operation since he has owned Tailgators. White indicated that he has not had any known remonstrances against his business since he has owned it. He stated that Exquisite Lingerie

⁴ One of the models, Janice Smith, was issued a summons for public indecency. This charge formed the basis of a violation issued by the ATC. When the public indecency charge was dismissed by the Marion County Prosecutor pursuant to a diversion agreement, the ATC charge was dismissed as well. Another model, Shelly Renee Phillips, was the same model cited in the permit premises on August 24, 2001, and was already under a diversion agreement. Not wishing to cause a problem with the diversion agreement, Sgt. Elder did not issue her a citation. The third model, not having exposed herself, was not cited by the police. However, all three, as well as Exquisite Lingerie, the company producing the lingerie show, were issued citations by the Marion County Controller's Office for performing without a nude modeling license.

⁵ The LB record reflects discussions among the board members regarding the content of police reports, but it does not appear that the Board relied on any specific aspect in reaching its decision to deny renewal of the permit. Instead, it based its decision primarily on the testimony of Sgt. Elder.

has been doing the lingerie shows since before he owned the bar and so he simply continued to use them. He stated that he had never seen any of the dancers or models perform any improper acts in his presence. With regard to the August 24, 2001 incident, White disposed of the matter before the Commission and paid a fine.

B. EXHIBITS

The following exhibits were introduced at the appeal hearing by and on behalf of the permittee:

1. Transcript of the LB hearing.
2. Certified Records concerning the November 30, 2001 misdemeanor charge against Jamie Smith, including the disposition of the matter.
3. Certified finding and judgment in the August 24, 2001 misdemeanor charge against Shelly Renee Philips.
4. Letter of January 22, 2002, from the City of Indianapolis, showing that permittee is in compliance with all zoning requirements.
5. Record of WCTY Channel 16 verifying authenticity of the videotape of the LB hearing.
6. WCTY Channel 16 videotape of the October 21, 2002 LB hearing.
7. Settlement of August 24, 2001 violation showing that permittee paid a \$500 fine.

III. FINDINGS OF FACT

1. The Permittee, Chandler & James Corporation, d/b/a Tailgators, 373 South Illinois Street, Indianapolis, Indiana 46225 (Permittee) is the holder of a type 210, Alcohol and Tobacco Commission (ATC) permit, permit #RR49-00528. (ATC File).
2. Chandler & James Corporation acquired the permit at issue on or about July 22, 1999. (ATC File).
3. Emmett and Linda White have been the sole owners of permittee since July 22, 1999. (ATC File).
4. The operation of the permit premises provides the primary source of financial support for Emmett White and his family. (ATC Hearing).
5. On June 21, 2000, permittee received a notice of violation for reduced pricing. This charge was resolved with permittee paying a fine in the amount of \$250.00. (ATC File).
6. The permit premises are from time to time the site of a lingerie show whereby adult female models show off various kinds of lingerie and female undergarments, and where patrons bid to purchase the items directly off of the models. Patrons are also given the opportunity to place dollar bills of various denominations under the elastic portions of those garments and against the

- bare skin of the model.⁶ Permittee staged the lingerie shows as a gimmick to draw crowds into the bar in an effort to compete with the area fast food restaurants. (LB Hearing).
7. On August 24, 2001, a lingerie show was held on the premises. A notice of violation was filed against permittee for public nuisance based on nude dancing violations and public indecency of one of the models. The cause was disposed with the permittee paying a fine in the amount of \$500.
 8. On November 19, 2001, following the resolution of the August 24, 2001 violation, permittee had its permit renewed for one year.⁷
 9. On November 30, 2001, a lingerie show was held on the premises. A notice of violation for public nuisance was filed against permittee based on nude dancing violations and public indecency charges made against one of the models. However, the cause was dismissed because the underlying criminal charges against the model were dismissed by the Marion County Prosecutor's Office. Additionally, in a lawsuit brought by the City of Indianapolis for violations of the nude modeling restrictions, the Marion County Superior Court ruled in favor of the defendant, and concluded that the nude modeling restrictions were not violated.⁸ This incident does not rise to the level of a record violation with the ATC. (ATC File).
 10. Permittee has a total of two (2) violations, namely the June 21, 2000 violation for reduced pricing; and the August 24, 2001 violation for public nuisance. (ATC File).
 11. There was no organized remonstrance against the renewal of the permit in this matter. (LB Hearing; ATC Hearing).

IV. CONCLUSIONS OF LAW

1. The Permittee, Chandler & James Corporation, d/b/a Tailgators, 373 South Illinois Street, Indianapolis, Indiana 46225 (Permittee) is the holder of a type 210, Alcohol and Tobacco Commission (ATC) permit, permit #RR49-00528, originally issued on July 22, 1999, and renewed annually thereafter. (ATC File).
2. Permittee's record before the ATC, consisting of two (2) violations of record, does not, by itself, disqualify permittee from renewal of its permit.⁹

⁶ During these types of shows, the models parade through the crowd of patrons who stick paper money inside the elastic waistlines of undergarments next to the skin. This practice is called "tucking".

⁷ IC 7.1-3-1-3(b) provides that permits in Marion County are issued for a two year period, but the LB has discretion to recommend a one year renewal, which cannot be exceeded by the Commission. What this means is that when a permittee has had a violation within the past year, the LB may recommend the permit be renewed for only one year, and if so, the permittee must appear before the LB the following year when that one year permit comes up for renewal.

⁸ *City of Indianapolis v. Angela Grzelak*, Cause No. 49F120112 OV004787 (decided March 6, 2002). The HJ is uncertain as to the identity of Ms. Grzelak, but it is clear from the Court's judgment that the event arose at the permit premises on November 30, 2001.

⁹ This HJ takes note that the nature of the violations, a public nuisance based on a lingerie show, which, from all available accounts, was completely confined to the interior of the building and did not involve the admission of any minors, along with a violation for reduced pricing, mitigate against a suspension or revocation of the permit.

3. The Marion County LB's action in denying renewal of said permit was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence.¹⁰
4. Denial of renewal of the permit based on the record in this case would be an excessive penalty not proportional to the offense committed.¹¹
5. There was no compelling substantial evidence against the renewal of this permit at either the LB hearing or the ATC appeal hearing, and for the HJ to affirm the LB in this instance would not be supported by substantial evidence.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the LB to deny the renewal in this matter was not based on substantial evidence and must fail. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was in favor of the Applicant and against the recommendation of the LB and the appeal of Permittee, Chandler & James Corporation, d/b/a Tailgators, 373 South Illinois Street, Indianapolis, Indiana 46225 for renewal of this Type-210 permit, permit #RR49-00528, is granted and the renewal of said permit applied for is hereby granted.

DATED: _____

MARK C. WEBB, Hearing Judge

¹⁰ (IC 7.1-3-19-11)

¹¹ That is not to say that repeated record violations of the public nuisance prohibitions might not be sufficient under other circumstances to warrant nonrenewal of a permit. Permittee is urged to be mindful of 905 IAC 1-27-2, and the sanctions contained in IC 7.1-2-6-1 through IC 7.1-2-6-14.